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SOME ANCIENT REPORTERS AND AN ANCIENT ACTION.

The modern reporter, under the necessity of, not depicting but reproducing verbatim, the origin, development and decision of a cause, is not permitted to make use of his imagination—must suppress his emotion, may not exhibit, though he have it, curiosity. It is true that these three human attributes have at times a way of subverting precedent, custom and authority that quite overrides the bounds of prudence, as witness the case of the reporter who massed all of the damning facts on which the decision was based, in a cold, logical sequence, and then wrote with quite illogical heat, and surely unreportorial emotion, "Held notwithstanding, all of these facts, that an injunction would not lie."¹ But this bit of *lese majeste* is better understood when it is known that the reporter was not an official of the court which had irritated him.

There is the touch that proclaims kinship in the report of an ancient case of the reign of Edward II (in which the defendant was indulgently permitted to make his choice of three punishments) in the exclamation of the reporter—

¹ *Philadelphia Base Ball Club v. Lajoie*, 10 D. R. (Pa.) 309.

"And 'tis to be wished we had been told which of them he chose to do; it is plain he did not choose the first, which was to marry the woman (for in that sense *affidare mulierem* is mentioned in Bracton), and I believe he was not hanged for his incontinency, therefore he must do the third thing."

The old reporter was an artist—picturing one phase of his daily life—and alternately through his quaint Norman French diction peer at us chicanery, strength, weakness, fraud, oppression, love, hate and rude satire, not in acceleration or retardation of a dramatic movement, not in a fixed order, but in faithful portrayal of the human way. You see his lawyers, their discomfitures, rapid changes of front, resourcefulness and occasionally their evil deeds, "Tondeby saw well that he must reply to the deed of the Monk and he made his client settle." Often the emotions of the rugged Bereford prove too much for him and he exclaims, "Mercy, but you talk wildly, Roger."

A historian will hardly consult our modern reports as a picture of our day—even of the legal phase of it. That awful mass of maimed and broken limbs with which the bulk of our modern litigation is concerned appears only as a verdict for so many dollars or is turned away for contributory negligence. Whatever emotion is stirred, evaporates with the oratory of the lawyers, and tears are dried by the verdict for the plaintiff or accelerated by that for the defendant; none of it gets into the report. The reporter is a wooden man reporting wooden things in a wooden way. He stifles the cries of the orphan beneath the rule in Shelly's case.

It has happened occasionally that a recent report lapsed into a moment or two of interest, then resumed its staid, awful, accurate, prosy way, fulfilling its true mission, which is to furnish lawyers with precedents and not to make nor record history. In the earlier history of the Commonwealth of Pennsylvania, a justice of the lower court so far forgot the tempered language, the calm philosophy, the dignified impartiality, which are the peculiar heritage of the modern bench and bar, as to use language like this in relation to an

attempt by a deceased husband to prevent his widow's re-marriage.²

"The principle of reproduction stands next in importance to its elder born correlative, self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy, the justice of expulsion from Paradise. It was impressed upon human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep—from the subtlety of the serpent to the innocence of the dove—from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues, are but 'curtains to the nuptial bed.' The principles of morality—the policy of the nation—the doctrines of the common law—the law of nature and the law of God—unite in condemning as void, the condition attempted to be imposed by this testator upon his widow."

A later judge, a cold, unsentimental person, commenting on this case, remarked that the decision had been reversed, but that the rhetoric would live.

Perhaps it is well that so few of our cases are worth remembering and that the cases which represent the beginning of our reported common law are locked in a medium of expression, which bars entrance to all but the reverent and the initiated. For from the Year Books, for a long time to come, will flow a stream of erudition and culture, that will mellow and sustain the scholarly traditions of the bar.

It is rarely that the scholar happens upon a field of research which so promises a substantial reward for his labors and at the same time so engages his interest and sympathy. The first recorded reports of cases! Here is enough to awaken curiosity at least. But more than that, there is wit, pathos and science. There is a thrill in reading an action which begins "Whereas in the Great Charter of England"—comparable only to the sensation one has in repeating the formula "that all men are and of right ought

² *Commonwealth v. Stauffer*, 10 Pa. 350.

to be free and independent." But Magna Carta plays a serious part in early litigation.

A case in Maynard³ reads thus:

"A brought a writ against Will, executor of the will of Angarice, executrix of T. of K. and the writ was such: 'whereas in the great charter of the Franchise of England it is contained that children after the death of their father should have their reasonable part of the goods and chattels which he had the day that he died, there had one G., our father, 300l. in goods, the day that he died, whose goods after his death came into the hands of the aforesaid Angarice as in the hands of the executrix; wherefore we came in the life of Angarice and we prayed that she render us our reasonable part, namely, the third part of the goods aforesaid, which amount to 100l. for our part, because he had no other issue but us; she would not render them of us in her lifetime, but wrongfully detained them, against the tenure of the great charter of the Franchise aforesaid, to his (plaintiff's) damages, etc.'"

But alas, for the principles which the great charter was intended to establish. The equal justice, the impartial trial, the protection of the helpless, all dropped lifeless before a technicality. The plaintiff had neglected to say that Angarice was executrix of T. of K. and his writ was abated.

It is one of our fundamental principles that nice questions of law shall not be passed upon by the jury. What hair-splitting we can do to demonstrate mathematically that our case is really not a question of fact, but a question of law, and not the province of the jury. That is not original. The fourteenth century lawyer was affected with the same desire. He was anxious that the jury should not wrangle over his delicate points of law, and if he can see no better reason, he will clothe his specious plea in a garment of jargon, in which array this dear child of his fancy looks almost attractive. He speaks with as little apparent bias as a manufacturing Midas praying for a tariff. Truly, O Sophist, the father of the Non-suit was born somewhere in the twelfth or thirteenth century.

These reporters came to their task with the freshness that novelty brings. And whatever may have been the crudeness

³ P. 215.

of their instrument, some of them display genius and taste in its use. Will the reader inquire with a start if he must suffer the enthusiasm of each student afflicted with an antiquarian mania? The practitioner might come by some strictly useful—strictly practical learning, that would serve him in good stead. For even now when the law is more or less largely the handmaid of commerce, the final test of hers and the lawyer's usefulness is efficiency. The most perfect system of bookkeeping, willingness and energy in disposing of cases, do not in themselves make for efficiency in practice. A slight knowledge of the law itself and a reasonable power of co-ordinating and classifying facts; a consciousness that there is a law of causation; these still form a necessary part of a lawyer's equipment. These qualities the lawyers of the time of Edward I and the generations immediately succeeding, possessed in a high degree. And their personalities, and their influence on legal thought and legal formula, make peculiarly attractive the record of their achievements at the bar. The part of that record which is of present interest ended in the reign of Henry VIII, having continued with tolerable regularity from the reign of Edward I, possibly of Henry III. The date of their beginning is placed at 1285.

We are not looking at a system of jurisprudence. We are looking at the origin of one. We are before theories. Almost, one might say, we are watching a world emerge from chaos. Given time enough, we might begin here, and trace the steps by which the fundamental notions of the common law became the basis of theories. Bracton, having studied the Roman law, would have manufactured theories for it, but the common law was stronger than Bracton.

The existence of a written chronicle, begat a rapid development of legal procedure; indeed, so rapidly did it develop between the time of Edward I and Edward III that the subtlety of the pleaders became insufferable, whence, perhaps descended to our day a part of that odium sometimes associated with the name of lawyers.

One accustomed to the sweeping generalizations of our modern law may view with wonder the large number of

actions of which he has never heard or the anomalies in those he is familiar with. If nature had impressed on legal systems its unerring law of the survival of the fittest, and operated that law with unerring precision, we might suppose that our own procedure was the best product of the evolution of law to the present, and with tranquil minds assume that all that has not survived, died of atrophy.

Yet, so long ago as the year 1719, one W. Nelson, a genial and learned person, who wrote the preface to the reports of John Lilly, made a telling argument against the discontinuance of certain actions, among them the assize of Novel Disseisin, and he who will so far indulge his curiosity as to read that preface, whether he seek amusement or instruction, will be amply repaid in both. The reader of the Year Books, then, is no dull pedant, burrowing in the mouldering dust of antiquity, but perforce an observer, a tracer of progress, one who is certain to discover many forgotten things in which the past excelled us, and perhaps may point to a corner rounded or a stile leaped, that never should have been taken. For, it must be known, that even Nature errs, that the fittest does not always survive, and that even the potato, humble though essential minister to appetite, in its mad effort to evolve was shorn of so many desirable qualities, that a Burbank must lead Nature backward several generations, until he reached where Nature should have stopped.

One might believe from a contemplation of the difficulties to be overcome *to litigate*, in the time of the early Year Books, that litigation was the manifestation of a disease, that left the suitor no rest until it deposited him in a court of some kind, at some place. This was especially true of suits involving lands held of a superior lord, which had to be brought in the court of the lord, who, of course, would not hold it, whereupon the tenant must issue an alias and a pluries summons and finally an attachment against the lord. If this secured his presence it did not assure his good will, and the luckless plaintiff then removed his cause, and sought justice elsewhere.

That we are near the origin of our system seems evident when the remedy for the dispossession of the lawful owner of property is considered—the ejectment of the wrongdoer by the owner. For the realization of this laudable ambition the owner had five days—four to collect arms and friends, and the fifth to do battle—or as the reporters euphemistically put it—to recover the possession. That a man of action should have availed himself of this remedy, should often have preferred war's "horrid alarums" to the peaceful and somnolent course of litigation should not awaken wonder; for in the year 1221, when Bracton's hero, the great William Pateshull held the famous eyre of King Henry III, there had been no general eyre⁴ to try cases for fifteen years. It will be recalled that King John promised in Magna Carta to send judges four times a year into all the counties.

A more serious observation comes to us; that persons are considered at the law in a certain sense as incidents to a procedure—a procedural law—and not as the embodiments of certain fixed rights and duties. It is a later philosophy of law that begins to administer its remedies as vindications of some natural and inherent right. Loosely considered the rights of the individual under any system of law are what the social authority for the time being allows. The problem under the early common law was to find a procedure into which the man and the harm done him might fit, and the man of law is continually crying, "It would be a great hardship if we were ousted from this writ, for we should then have no writ at all." It is no "merveille" to quote themselves, that this procedure became so refined as to be unendurable. The aim of the pleader was to find a defect in pleading—his eye was upon a legal form—not a legal person, and he bent his subtlety to driving

⁴ An eyre was a circuit of the king's court—it might be called a wandering or peripatetic court—held in the various counties during periods more or less certain according to the royal mood. The word eyre is probably derived from the Latin verb "erro," to wander. Hence, eyre, an itinerant court.

his opponent to some dangerous admission, whereupon he might claim judgment. It was the Socratic reasoning in its purest form. There is a case reported in the Year Book of Edward II⁵ which affords a good example of the vigilance required on the part of the judges to prevent injustice, and illustrates also the picturesque diction that lends to these reports an immortal literary value.

A complaint was made by one Robert Moreys that Thomas of C. wrongfully took his beasts. It became evident in the progress of the trial, that a disseisin had taken place, whereupon Bereford, J., without preamble addressed the counsel of the disseisor, thus:

"A man lay sick, and so feeble was he that he swooned; and as he lay there he was told that he saw three gibbets, each one higher than the other, and on the lowermost he saw his grandfather hanging, and in the middle he saw his father hanging, and he asked why they were hanged; and someone told him that his grandfather had done a disseisin and for this was he hanged there, and his father had continued the disseisin and for this he was hanged still higher, and the third gallows was made for him because he had continued it still longer; and so be not too well assured, if you have perpetuated a tort."

The fate of the recreant disseisor of the parable was not unlike that ordained by Charondas, the Locrian legislator, for those lawmakers who were continually presenting some sovereign remedy for humanity's ills. He enacted "that whenever a new law was proposed, the individual having the hardihood to suggest the law should do it with a halter about his neck, so that in case his proposition was rejected, he could simply be hung up." It is said that "this salutary institution had such an effect that for more than two hundred years there was only one trifling alteration in the criminal code—and the whole race of lawyers starved to death for want of employment."⁶

But even in those early times, procedure ridden as was the law, it was still jealous of the liberty and independence of the subject. It was said in a report of the reign of

⁵ Maynard, 54.

⁶ See Irving, Knickerbocker History of New York.

Edward IV that "arbitrary imprisonment is unknown to the law." And that the common law was jealous of its origins and firm in its refusal to be beholden to the civil law is manifested in one of the earliest reported cases, a case which appears in Maynard,⁷ of the fifth year of Edward II. The occasion was the trial of an action of *Cosinage*,⁸ in the course of which Inge, Justice, remarked "what do you reply to the civil law, upon which the law of the land is founded and which says that the inheritance should descend to the most worthy, because the possession of a brother makes his sister an heir." Bereford, J., promptly rebuked him. "If Aleyn had a sister of the whole blood who entered after his decease, the tenements would sooner escheat to the chief lord, than descend to the sister of the half-blood, and this is the *common law*, which ought not to be changed."⁹

The reporter's love of the picturesque asserts itself in the most unexpected places and lends to the commonplace recital of titles and dignities, an air, almost of splendor. What but keen appreciation of its need to complete the picture could have led the reporter, who had probably witnessed hundreds of oaths of fealty, to insert in his report of a writ of "*per quae serviciae*" this formula."¹⁰

"And John Mury did homage so that he might hold these two manors jointly, and clasped his hands between the hands of John de Trellan, and said—Behold, now, John de Trellan, that I become your man of the tenements which I claim to hold of you by the assignment of James de Trellan, against all men, saving the fealty which I owe to our lord the King of England, and to his heirs, and then he kissed his lord and made the oath."

⁷ Maynard, 148.

⁸ *Cosinage*. There were three actions that lay for a wrongful entry. If my great-grandfather or my grandfather's father died seized of lands in fee simple and a stranger entered, I brought an action of *cosinage*; if my grandfather died seized and a stranger entered, I brought a writ of *ael*; if my father, mother, brother, sister, aunt or uncle died seized and a stranger entered, I brought an assize of *mordancestre*.

⁹ Maynard, 148.

¹⁰ Maynard, 188.

Did the delicate blood of the lords shrink, it may be wondered, from the caress of the villain, as did the guests of Trimalchio, rewarded for having saved his slave a beating *stupentibus spississima basia impegit*.¹¹

It may be doubted whether keener minds have ever been set to the resolution of legal problems than those whose names appear as counsel in these reports. And they were not only keen, but learned as well. Your advocate of that period will furnish you a good reason in English, in Norman French, and in Latin. If we get from our solicitor of to-day a good reason couched in fair English, it is no mean achievement. It is recorded that William Wirt, associated with Daniel Webster in the case of *Gibbons v. Ogden*, turned an argument against Mr. Emmet by showing that he had misconstrued his quotation from the *Aeneid*. I wonder if Mr. Emmet could lose his case in that way to-day.¹²

¹¹ Petronius, *Cena Trimalchionis*, C. 4, lines 31-36.

¹² Mr. Emmet, in concluding his argument, dwelt with enthusiasm upon the triumph wrought by the genius of Robert Fulton. But for the encouragement given him by the state of New York, he and his discovery might have suffered the fate of others who had essayed a like performance—oblivion. The people of the state, of the country even, may well ask whether any single material blessing is enjoyed equal to that conferred by the patronage of the state of New York to Robert Fulton. The state may proudly raise her head and cast her eyes over the whole civilized world; she there may see its countless waters bearing on their surface countless offsprings of her munificence and wisdom—and justly arrogating to herself the labors of the man she cherished, and conscious of the value of her own good works she may turn the mournful exclamation of Aenas into an expression of triumph, and exultingly ask,

Quae regio in terris nostri non plena laboris?

(What region of the earth is not full of our works?)

To this at the close of an eloquent reply Mr. Wirt observed that his learned friend (Mr. Emmet) had eloquently personified the state of New York, casting her eyes over the ocean, witnessing everywhere this triumph of her genius, and exclaiming in the language of Aenas,

Quae regio in terris nostri non plena laboris?

(What region of the earth is not full of our works?)

Sir, it was not in the moment of triumph, nor with feelings of triumph, that Aenas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the works of art with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the

Is not this incident the token of an alert mind? It took place when pleadings were oral—when the pleader listened to the argument of his adversary and made his reply impromptu. The manner in which the attorney, Devom, showed a variance between the Latin writ and the French averment of descent is instructive.

Devom, for the defendant, asked judgment of the writ for this reason, that the plaintiff in his writ said—that H. was great-grandfather of the said Alice and cousin of G. aforesaid (*H. proavus predicte Alice et consanguineus predicte G.*), and in the descent he has made H. great-grandfather to Alice and great-great-grandfather to G. (*il ad fait H. Besael a Alice & Tresael a G.*); and a great-great-grandfather can never be called a cousin. To which the plaintiff replied, "If you abate this writ, we shall never have another." Bereford, J. "Not in Latin nor in French, can one make a great-great-grandfather a cousin and therefore you will take nothing by this writ."¹³

Case after may be found in which the writ is abated for *faux latin*. Thus, one Will sued Alice and demanded certain *tenements* in which she had no entry except upon a disseisin made by her husband. After much fencing the defendant found himself in a quandary and went out to *imparl*.¹⁴ He returned and said that the writ gave the

sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes—the loss and desolation of his friends—the fall of his beloved country, rush upon his recollection.

*Constitit, et lachrymans; Quis jam locus, inquit Achate,
Quae regio in terris nostri non plena laboris?*

(He stood and weeping, said, What place, then, what region of the earth is not full of our misfortunes?)

Sir, the passage may, hereafter, have a closer application to the cause than my eloquent and classical friend intended. For if the state of things which has already commenced is to go on; if the spirit of hostility which already exists in three of our states, is to catch by contagion, and spread among the rest, as, from the progress of human passions, and the unavoidable conflict of interests, it will surely do, what are we to expect? See *Gibbons v. Ogden*, 9 Wheat. pp. 158, 183, 184.

¹³ Maynard, 152.

¹⁴ Going out to *imparl* was simply leaving the court room to talk it over, or consider the advice of the court.

court no jurisdiction to consider the plea "because there is no date in the writ, for the writ says *teste me ipso tertia die Augusti*;¹⁵ which is not Latin, but it should be *Augusti* judgment of the writ. The court, of its own notion, abated the writ, for this remarkable reason, that if judgment were entered upon such a writ, and a writ of possession given to the sheriff, the sheriff upon a return of *nihil habet*, could not proceed under a new writ to take the property held by the defendant when suit was begun, because the original had no date, the moral of which seems to be, that an accurate knowledge and use of Latin was not the least of a lawyer's equipment, in the year of grace, 1337.

An agreement by the church to chant masses for the souls of all christians would seem to place an abbot under a solemn duty—which with holy zeal he would be certain to fulfill. Yet there is recorded an instance in which the souls of all christians were in a parlous state, for the abbot sought to levy his fine without mention of the masses, and this in the face of a royal charter,¹⁶ expressly stipulating for the chanting. The case was like this.

Robert of B. Chevalier¹⁷ rendered¹⁸ by fine the manor of E. to the abbot of G. and to his successors forever and he showed a charter of the king, which said that the king had given leave to Robert to render the land as it was said, to find two chaplains at all times in a certain place to chant for the souls of all christians; and they would have levied the fine without saying anything of the chanting in the fine, and the court refused it because it was not according to the charter of leave, and then they levied the fine according to the charter.

And now a word of these fines. It has often been a matter of complaint that many of the Year Book cases are indecisive. There is a long recital of tiresome facts which

¹⁵ Y. B. X Edw. III, f. 397, pl. 31.

¹⁶ The word charter is a general term used in the reports to designate a deed or any other formal writing.

¹⁷ Y. B. Edw. III, f. 52, pl. 15.

¹⁸ Rendered, transferred, conveyed, released.

ends abruptly leaving the mind quite in the dark, whether the demandant got his beast or the villein his freedom. Not the lesser part of this indecision is due to the practise of conveying property by fine, which naturally ended that some one confessed that the tenements were of the right of someone else. We are in a time when property was conveyed by livery of seisin or unrecorded documents. But there was a way in which a man might have a public record of the fact that he had taken title to lands, and that was by bringing a fictitious lawsuit, in which one party admitted that he had conveyed the property to the other. Thus A who owns land gets his friend B to sue him and in court confesses that he has conveyed all his interest in the land to B. B thereupon, with the consent of the court, grants the land to A with remainder to the heirs of his body, or in whatever manner the parties have agreed upon. The agreement of the parties is then expressed in writing, and the conveyance is made—the entire document being *bipartite*. The lowermost portion is the “pes” the foot of the fine, improperly so named, which is deposited in the treasury; the upper part or note is held by the grantee. When, then the note of the fine is produced in this or that action at law, and is challenged, the court sends to the treasury for the foot of the fine, and compares the two parts. Now, almost any action would serve the purpose, but covenant or warranty of charter finally superseded all the others, and where they merely cover a conveyance, they contain no decision and are valueless as authorities. Witness now, the importance of producing part of the fine as evidence of title.¹⁹

A writ of entry was brought against John of Clayton-Schard. (For the defendant) we hold these tenements jointly with Eleanor, our wife, not named in the writ, judgment of the writ, and he showed a transcript of a fine which witnessed this.

¹⁹ See Pollock and Maitland, *History of English Law, Fines*; and the three essays of F. W. Maitland cited *infra*, note 36.

S. You show nothing that is of record, wherefore we will aver that you were sole tenant the day of the writ purchased.

Herle, J. Unless he show a part of the fine, you shall drive him to show the plea, because that which makes against the party is not of record.²⁰

The defendant, with an assurance which no lawyers, ancient or modern, are reputed to lack, offers to prove his case by producing merely a transcript of a fine. As one of the essential proofs of the genuineness of his conveyance is that the "pes" of the fine, when taken from the treasury, should "match" the note or upper part held by the defendant, a transcript was quite useless for the purpose. Hence his adversary reiterates his complaint and denies the allegation that there is a joint tenancy, and the court upholds him.

One must imagine a certain malicious smile upon the countenance of these advocates as they produce, perhaps from their capacious sleeves, charters, witnessing *ipsissima verba*, the justice of their cause. For not infrequently, the charter is produced only after the advocate has been driven beyond the help of all verbal proof, to draw from somewhere about his person "a charter which witnesses all these facts." And we may perceive also a certain grimness in the stolid utterance of the judge—"Let us send to the treasury for the fine"—a threat that rarely fails to elicit a reply so obviously to the disadvantage of the advocate who makes it, that its sincerity is beyond question.

There comes to us a keen feeling of joy as we see one of these doughty logicians rebuffed. A gasp of expectation takes us as we witness an affront to the great and arbitrary William de Bereford. We do not know how he will resent it—we do not venture to prophesy his retort—but we look for his reply well assured that he will strike back—and as is meet for the great Bereford.

As great to great—he does not use the process of his

²⁰ Y. B. III Edw., III f. 52, pl. 14.

court to procure a certificate of a record from the treasurer and from the barons. He sends them a courteous note demanding the certificate. The note bears the seal, personal, of William de Bereford. And because it is a personal seal, the treasurer and the barons refuse the gentle demand of the gentle Bereford.

Unperturbed, Bereford issues a formal rule of court returnable on a day certain, and demanding by legal process, the certificate. Observe now, the treasurer and the barons—do they tremble? Not they. They dare not defy Bereford, thus sueing—but they wait the full time and produce the certificate on the return day—not one minute before. The case ends here. We may be certain the treasurer and the barons heard from Bereford, later—if we could but know how.

For the disappearance of many of the actions with which the Year Books are filled, it is not difficult to assign a reason. Many of them were found to be so favorable to delays or of such narrow application that they fell gradually within the purview of actions of wider comprehension.

Such was the action of Darrein Presentment which was brought to recover a right to present a suitable parson to the church, and which was superseded by an action of Ejectment or of *Quare Impedit*, and the action of Droit d'Advowson which, says Lilly, "could not be brought but where the plaintiff had a fee simple in the advowson." These actions were so little used that in a case²¹ reported in Croke Carolus the court seems doubtful about the procedure. This case is interesting as showing how the rights of a suitor may fade as the knowledge of his remedy becomes faint in the mind of the court. It is curious that a doubt should have arisen over a matter of procedure that modern historical research has made relatively clear. The parties in a writ of right of advowson, being at issue and put upon the assize, there issued a *venire facias* to return four knights, that they should return twelve others, who,

²¹ *King v. Dryden* and three others, Cro. Car, 511.

with the said four, should make a jury returnable to the Octaves of Michaelmas. The clerks, however, said that the course was for the four knights to choose twenty, which was done. But afterward the court reserved for decision this question, whether "this estier (choice) of twenty to the four knights be good or whether they ought to choose and return twelve only." It seems, however, that the knights in accordance with the ancient practise should have chosen twelve.²²

This doubt arose over so serious a matter as the choice of a jury. A glance at the early writers and some cases in the Year Books will disclose some indecision. In Britton we read:

"Next let the bailiffs of the sheriff swear, that they will truly present two or four of their bailiwick, or more or less, who are not appealed of any crime, nor are appellors, and such as shall best know and will inquire and discover secret acts concerning the breach of our peace. And when the names are given in, let those come and swear, that they will lawfully associate to themselves such others by whom the truth may best appear."

A statute of uncertain date (of the reign of Edward I) fixed the number to be chosen at twelve but called for two knights only. Bracton and Fleta mention four knights.

This is interesting in view of the case, presently to be cited, for the court is uncertain when an exception to the impartiality of the four knights should be presented; and whether the decision of the matter rests with the court or with the companions of the juror or knight accused. The action was a writ²³ of right. On the return day of the *venire facias* the defendant challenged one of the four knights before the justices because he was a cousin of the plaintiff, and thereupon arose a great debate. Choke, J., says:

"It seems to me that he shall not have the challenge before us, but he shall have his challenge before the parties when the four knights are

²² Britton (Nichols), vol. I, p. 22.

²³ Year Book, 15 Edw. 4, pl. 1.

in a house to hold the election of the grand assize and if one of the four knights be challenged by any of the parties, the other three shall try this challenge; and if they find that he is biased, he shall be rejected; and if another one be challenged by any of the parties, the other two shall try the challenge; and if they find that he is biased, he shall be ousted; and if another be challenged then another writ shall be awarded to summon three knights, for no challenge shall be tried except by two at least."

Brian, J., was of a contrary opinion, for a reason which sounds very modern.

"It seems the contrary to me and that he should have his challenge here before us, since you are all agreed that the party shall have his challenge and if he have not his challenge before us he shall never have a challenge afterward, because the parties have admitted before us that their four knights are indifferent (*i. e.*, unbiased) persons to make the election of the grand assize, and against their own admission, they shall never have a challenge afterward, and because of this inconvenience I think they should have their challenge before us."

But it was decided that the challenges must be made when they were assembled to select the grand assize. And this seems to accord with the statements of the writers, which fix the number of knights at either two or four, and the statute which says two.

But whatever the fate of other procedures there is reason for recalling to memory the now disused action of Novel Disseisin. All English speaking people maintain toward those documents which proclaim inherent equality, inherent rights in all human beings; which proclaim the individual's exemption from arbitrary exactions, and the subjection even of sovereignty to the will of the people, a certain veneration, and Magna Carta and the year 1215, stand in a hallowed niche of those halls of veneration. Magna Carta was made the expression of English liberty. But back of Magna Carta had been other recognitions of English freedom, and one of the most striking of these was the establishment of the action of Novel Disseisin, in the year 1166, then for the first time giving a formal remedy to a man who had been forcibly or wrongfully ousted from his land.²⁴ Considered as one of the earliest means

²⁴ Mr. Maitland says of the action, "It is not a paradox to say that

of enforcing the Englishman's most sacred property right, the action of Novel Disseisin, the ancestor of our ejectments, is somewhat more than a curiosity.

We have so long thought of ourselves as foster children of a common parent, the state, who guards our rights, redresses our wrongs, and in modern times takes a personal interest in our welfare, sees to our education, discharges, even, the debt of our follies, that the once interesting man in a state of nature "has become a dull myth." Yet he survives in us, a living contradiction to political theories. We still see ownership most clearly when the owner is sitting on the thing he owns. And as we take our way backward, we see the owner becoming more vigilant, more self-conscious, of the union between his property and himself. When we are far enough back, the law is somewhat dubious over the subjective notion of ownership and is apparently more exercised with the objective notion of possession.

Such was the state of the law when the Year Books, began to appear. Possession of a certain sort, or seisin, was protected even against ownership, as will presently appear. If you were ejected from your land—deprived of possession—seisin of it—you were disseised, and your remedy was an action of Novel Disseisin. The question of present right to possession was dominant, and this must be settled as a preliminary before the court would cope with this esoteric notion of ownership.

Let us recall that there were no vigilant, impeccable, policemen at every corner, guarding jealously the citizen's property rights—his person even—that every citizen was then, as he is now, a policeman, that, if a marauder, or a bully, decided to toss you out of your house, and live in it himself—either your neighbors must have a deep personal

the year 1166, the year of the assize of Novel Disseisin, is more decisive than 1066, the year of the battle of Hastings, for this assize gave to every man dispossessed of his freehold a remedy in a royal court, a French speaking court, and thenceforth the victory of French law is secure. This is important in history, for language is no mere instrument which we can control at will; it controls us."

interest in your welfare, to aid you—or you were obliged to collect an army—and redress your own wrongs. If it happened as mentioned before, that the king's justices held no general eyre to try cases in fifteen years, possession really is more important than ownership.

For breaches of the king's peace, the hundred was held responsible, and if it did not produce or punish the offender, it paid a fine²⁵—or as the records say, it was amerced (*ideo in misericordia*). And if a king's court come after fifteen years, to search for murderers and highwaymen, and to try assizes for the possession of land, the man in possession and defending assuredly has the advantage. Now the way the person who was dispossessed regained his possession was by means of the action of Novel Disseisin. Men who wished to have the advantage of being defendants in such an action, frequently obtained the possession by fraud or force, and held it until they could be dispossessed only by legal proceedings.

The chief article, Mr. Lilly tells us, in an Assise of Novel Disseisin is, that the demandant was disseised of his freehold unlawfully and without any judgment given against him in any court whatsoever.²⁶

It was not a proprietary action; it did not affirm the title of the man to whom it returned the possession; and he might in turn be deprived legally of the possession upon a proprietary action, called a writ of right, brought by the very one against whom he had succeeded in his action of Novel Disseisin. But the principle involved was that a man could not be forcibly and arbitrarily turned out of possession of property which ostensibly, at any rate, belonged to him, and the action of Novel Disseisin gave him a day in court, to contend for his rights. Every proceeding in the writ, as you will find stated in Lilly's Reports, was designed to further the cause of justice. "And this action is so far

²⁵ Pleas of the Crown for the County of Gloucester, Introd., XXXIII.

²⁶ Lilly, Preface, lx.

from being dilatory," says Lilly, "that it is commonly called *festinum remedium*, not in respect of any precipitancy in the proceedings, but because justice and right are sooner obtained than in any other action whatsoever; for the defendant shall not be *essoined*²⁷ nor cast a protection, *i. e.*, no excuse shall be admitted; nor shall the king himself by his prerogative exempt him from appearance; neither shall he vouch a stranger, or another be received to defend his title, if he should make default; for receipt doth not lie in an assise, &c., *i. e.*, a third person shall not be received to plead with the defendant; all which are dilatories allowed in other actions."

The word novel in the name of the action is a misnomer. A recent wrong was the one aimed at, but royal ordinance from time to time fixed new dates from which the limitation of the action was said to begin, that is, no action could be brought for a disseisin committed before the arbitrary date, known as the limitation of the action, until it extended back first for forty and finally for three hundred years. The theory of the action was that one must not assert his rights by violence in contempt of the king's court, and so we find it reported in the Year Book of Edward III that in an assise of Novel Disseisin, against three disseisors, they were condemned to prison because one of them had entered by force and arms.²⁸ Four days were given in the action within which the owner might re-enter by force; they were supposed to be a reasonable time, and this reasonable time is greater in exceptional cases.²⁹ It is not the ownership of land that the action is trying to protect—it is seisin.³⁰

²⁷ An *essoin* was a continuance or postponement of the time fixed for a hearing.

²⁸ Y. B. 11 Edw. III, f. 33, pl. 15.

²⁹ The exceptional cases were, where the owner was in a distant land when the *disseisin* took place; when he has gone on a pilgrimage to Jerusalem, or in case of other excusable absences. The reasonable time was determined by analogy with the practice in *essoins* or continuances. In Britton will be found the rule by which such questions were determined. Britton (Nichols), vol. I, pp. 294-5.

³⁰ Britton, Edited Text and Translation by Francis Morgan Nichols,

When it is realized how very little remains unsettled to our present science one pauses in relief before a subject that affords a mystery. Until within a few years there were two names that left conjecture open to the wildest flights, and conjuring by those words men forsook life, liberty and the pursuit of happiness to lay bare their secrets. Needless to say they were Lhasa and the North Pole. Now but one of these is a mystery. Back of an almost impassable mountain range, high, almost in the clouds, resides the seat of a potent spiritual organization. Insolent man scales the bulwark of the gods, thrusts aside the curtain, and the city of romance becomes a shabby collection of huts, wallowing in filth. And doubtless science is about to deprive us of the last theatre of imagination, and reveal to us perhaps that it is not held in place by a scion of a Celtic race—is, in fact, merely a spot upon the earth's surface.

We owe then a debt of gratitude to the "mystery of seisin." For here is a full grown mystery—one that has baffled the curiosity of lawyers for a thousand years. Mystic attribute of land, that keeps the owner in possession while he is on it, and bars him out if he leave it, should anyone take a fancy to it in his absence. And if the owner cannot travel North, East, South and West and collect arms within four days, to eject the intruder, his land for him has lost that mystic attribute and he must hie himself "to our justices at Westminster." But there is here a greater mystery, for if A, the owner, let more than four days elapse before ejecting the intruder and then eject him, B, the intruder, may go to the justices at Westminster and dispossess the real owner. And this same seisin is somewhat more than possession, for in Britton we read,

"A person may be disseised in many ways. For one is properly said to be disseised who is wrongfully ejected out of any tenement which he peaceably held, and in whose person the right of property in the fee, and the right of possession of the freehold, and the seisin were united."

p. 272; Bracton, 161; Fleta, 213, sec. 8, F. W. Maitland; Three Essays, viz.: The Mystery of Seisin, *Law Quarterly Rev.*, 1886, p. 481; The Beatitude of Seisin, *Law Quarterly Rev.*, 1888, pp. 24

Bracton and Fleta are to the same effect.

One might reason *a posteriori*, that seisin was the union in one person of the right of property, the right of possession, and the actual possession. But so much was not necessary. If A have all of these rights, including seisin, of property located at York and pay a visit to London, and on his return find B in possession, B is a disseisor; but his possession is not seisin, not yet. A, then in four days collects arms and friends and ejects B. B has never had seisin. But suppose that A waits ten days before ejecting B. A himself is a disseisor, and in an action of Novel Disseisin, the court will return the possession to B though he obtained it wrongfully. For B since the fifth day has had seisin of the land. One over hasty in generalizing will then say, "Seisin is possession, however obtained, persisted in long enough to prevent anyone from dispossessing him seized, forcibly or without legal proceeding." Immediately a case appears which destroys this conclusion. For, if the rent of tenements leased be withheld, it seems that the landlord may consider himself disseised and bring the assise. The facts were these.

The predecessors of the prior of T gave certain tenements to Thomas Tregers in fee tail, rendering to them forty pounds a year, without saying in the deed, of what tenure. The rent was paid for a long time until now Sir Thomas withholds it. The Prior made a distress on the land and then brought the assise, he being in possession of the same distress because Sir Thomas would not bring replevin. The counsel of the king was in doubt whether this rent was a rent service or a rent charge, because the deed did not say of what tenure. Because, if it were a rent service, then there was no action of disseisin by reason of the retention of the rent, unless the distress was replevied or rescue had been made. If rent charge then retention is sufficient cause. Therefore query if this were rent service or rent charge, and I believe says the reporter that he held of the donor but query.

The meaning of this is clear. If Sir Thomas held by

rent service, or of the donor, he committed no disseisin in withholding the rent, unless he made a rescue or replevied the goods that had been distrained for the arrears of rent. Sir Thomas apparently had all the facts in his possession, for he wisely refrained from doing either. And the reporter argues, from this, that Sir Thomas held of the donor, and hence had committed no disseisin.

This much is apparent from a consideration of all the earlier cases of disseisin—that the law was vindicating naked possession or the immediate right to possession. One cannot pass through the Year Books without noting the marked decrease in actions of Novel Disseisin as he progresses. And they blend gradually into other actions, become writs of entry *sur disseisin* and the like, until one finds questions of title paramount in actions once wholly possessory. This may be illustrated by contrasting the earliest cases with the latest. One case will be typical of the others. Thus, in the reign of Edward III,³¹ Cecil Short brought an assise of Novel Disseisin against Maud, daughter of William the Bold, and complained that she had disseised her of her freehold. Maud came and said that she had done no wrong.

Now, Maud was really entitled to the lands, for she had permitted her sister, Isolda, to enter and remain upon them for five years, in the course of which Isolda, faithless to the traditions of a name that spells truth and constancy, gave the tenements, unbeknown to the guileless Maud, to one Roger on his marriage with her daughter Cecile, a not altogether novel (even at that time), and not entirely forgotten (to our own day) method of obtaining a "dot" for one's daughter. Maud took the law in her own hands, and the lands, whereupon Cecile brought an assise of Novel Disseisin. The court returned the tenements to Cecile, although title really was in Maud.

However unjust this summary method of dealing with disseisins may appear, it is probable that the severity with

³¹ Y. B. I Edward III, f. 14, pl. 18.

which offences of the sort were visited, had much to do with the decline of acquisition of land in that way. The rude weapon of force gave place to the rapier of fraud. Later disseisins disclose more cunning than violence.

The answer to a disseisin in the time of Henry VII is quite different from that which would have been given in the reign of Edward II. Thus³² a defendant in a writ of entry was permitted to say that he was seised until the plaintiff disseised him, upon whom he re-entered—a dangerous answer surely had the disseisin taken place two centuries before.

If we examine now, the last thoroughly considered case of Novel Disseisin reported in the Year Books³³ we shall find discussion confined principally to the question of title. One John Colt brought an assise of Novel Disseisin before the justices of the common bench and the tenant (the defendant) pleaded in bar that his father was seised and died seised, and he entered as son and heir.

The plaintiff said that after the descent (to the defendant) a stranger was seised and gave to the father of the plaintiff in tail and of this his father died seised and he entered as son and heir, and was seised as heir in tail until the defendant disseised him, and he prayed the assise. The tenant repeated his first assertion and prayed that the assise³⁴ might come upon the title. And thereupon the jury was called and chanted³⁵ for the plaintiff, and found seisin and disseisin (seisin in the plaintiff and disseisin by the defendant).

There is an elaborate discussion, whether or not the defendant might properly say, "let the jury pass upon the title." But the matter of interest to the present purpose is

³² Y. B. 16 Henry VII, f. 4, pl. 11.

³³ Y. B. 5 Henry VII, f. 29, pl. 12.

³⁴ The assise—here the jury. The assise according to context, is a session of court, an action at law, or a jury.

³⁵ This probably is Norman French slang. The jury is generally said to sing for the plaintiff or the defendant. (*L'enquest fuit pris, et chaunta per le plaintiff.*)

the changed basis upon which the court proceeds to resolve the problem. It is not the simple matter of one holding possession and another ejecting him by force. It is a matter of ownership. Both parties now try to show a title to the land.—The defendant shows a title in his family for two generations, hence no wrong done by him. The plaintiff shows an apparent alienation to a stranger, and possession by his father and himself until the defendant unlawfully ejected him. In the early history of the action, the jury would not have been asked to try the question of title. The fact of disseisin having been found, possession of the land would have been delivered to the plaintiff, and the defendant if he had a better title, would have had his writ of right or some other appropriate action to determine the controversy.

It has been impossible here to do more than glance at the history of an action which was in actual use for more than six hundred years, and to which even now Mr. Lilly's long and earnest argument for its continued existence might effectively be applied. In three essays, the product of careful research,³⁰ Mr. Maitland shows that during the last three hundred years of the existence of the action, it was never permitted by the law to turn the possession of property over to one who had dispossessed the rightful owner. But in the time between 1166 and three hundred years ago, that was the rule.

The true owner of land might be dispossessed if he ousted the disseisor, more than four days after the disseisin. And even title itself is rather an uncertain thing without possession. A deed to property which has not been formally delivered into the possession of the holder, is not altogether a desirable piece of property. The fact that the one in possession obtained it by force or fraud is of no moment if the owner did not oust him in the reasonable time allowed by the law for collecting friends and

³⁰ The Mystery of Seisin, *Law Quart. Rev.*, 1886, p. 481; The Beatitude of Seisin, I and II, *Law Quart. Rev.*, 1888, pp. 24 *et seq.*, 286 *et seq.*

arms. This is not due to a theory of possession. It is certain that there was no theory of possession or ownership in the time of Edward I nor for a long time afterward. The Year Books have nearly reached an end before mere possession, or seisin, is a lesser thing than ownership. And even then there are a few exceptions to the rule that ownership is superior to possession, the principle one being the case of a descent cast. This was where the disseisor has died and his heir is in possession. The tort died with the tortfeasor, and the assise did not lie. The knowledge of the exact period at which possession lost its supremacy is locked in the Year Books. And there also is locked the origin of the common law conception of ownership. At some point in the reports we shall be able to say that the scales began to turn against possession.

The great majority of the questions that arose out of disputes over possession came before the court in the form of assises of Novel Disseisin. And they were settled at first by having what we might call a case stated ready for the affirmation or negation of the jury. Did A dispossess B of his free tenement in X unlawfully and without judgment of a court? To which the jury merely said, Yes or No. There was at first no inquiry into the rights of the parties beyond that of possession. But questions of title did gradually creep in, and ownership did become more important than possession, until finally before the Year Books are ended the question really controlling is, who is the real owner of the land. Thus the action of Novel Disseisin, established to protect the then most important indicium of ownership, followed the development by which possession ceased to mean ownership, and really became a means of asserting title to land.

The writer has scarcely indulged the hope of adding to the common stock of knowledge, in this brief and all too fugitive series of observations, beyond affording a kaleidoscopic glimpse of a genial and learned group of men, who played their parts with firmness and dignity, who founded

the traditions of our bar upon a plane that might, without hyperbole, be termed exalted.

It is said in Green's history that the English law has been substantially unchanged since the reign of Edward I, and that it took its modern form at that time. Even this desultory account of a few cases from the Year Books reveals that the historian's statement needs qualification. Men were still waging their law; there were compurgations, and ordeals. The distinction between real and personal property is not too well defined; possession is, as Maitland says, an outwork of ownership, and cattle lifting and land grabbing fill the courts with litigation to much the same extent as our modern negligence.

But there is a certain privilege in making the acquaintance of William de Bereford, or Henry le Scrope; and we cannot exaggerate our obligation to the reporters who have preserved for us so vivid a picture of their wit; the soundness of their judgment; the loftiness of their characters. Shall I be forgiven for stealing one incident of Bereford from Mr. Maitland's introduction to the first volume of the translation of the Year Books in the Selden Society's publication.³⁷

Bereford is chief justice of the Common Pleas; Mutford and Stonor are justices. Stonor has been taking part in a debate with counsel. Then we read this:

"Mutf. Some of you have said a great deal that runs counter to what was hitherto accounted law.

Ber. Yes! That is very true, and I won't say who they are. (And some people thought that he meant Stonor.)

The chief justice had refused 'to name names,' though perhaps his glance along the bench was eloquent."

They make good company; and their law was not less sound for their love of "pleasing anecdote" or humorous view of life.

George F. Deiser.

³⁷ Introduction to Year Book, 1 and 2 Edw. 11, Selden Society, p. xiv.